

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of )  
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CALIFORNIA DEPARTMENT OF )  
TRANSPORTATION )  
 )  
For Review of Waste Discharge )  
Requirements Order No. 94-098, )  
NPDES Permit No. CAS029998, by the )  
California Regional Water Quality )  
Control Board, San Francisco )  
Bay Region. Our File No. A-930. )  
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ORDER NO. WQ 95-2

BY THE BOARD:

On August 17, 1994, the California Regional Water Quality Control Board, San Francisco Bay Region (RWQCB) adopted waste discharge requirements for storm water discharges from construction, maintenance and operation of highways, expressways, freeways and maintenance facilities owned by the State of California, Department of Transportation, Districts 4 and 10 (Caltrans).

On September 16, 1994, the State Water Resources Control Board (SWRCB) received a petition from Caltrans contesting the issuance of the waste discharge requirements.

I. BACKGROUND

The 1987 amendments to the federal Clean Water Act<sup>1</sup> added provisions specifically requiring the issuance of national pollutant discharge eliminations system (NPDES) permits for the

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<sup>1</sup> The Clean Water Act, 33 U.S.C. Section 1151 et seq., is also known as the Federal Water Pollution Control Act Amendments of 1972. The 1987 amendments are entitled Water Quality Act of 1987, Public Law 100-4 (February 4, 1987).

discharge of storm water to waters of the United States.<sup>2</sup> The amendments required that certain categories of storm water discharges be permitted, including storm water discharges associated with industrial activity and discharges from large and medium municipal separate storm sewer systems.<sup>3</sup>

The waste discharge requirements which are the subject of this petition were issued by the RWQCB to Caltrans as both a municipal and an industrial discharge of storm water. Caltrans seeks review of the waste discharge requirements, claiming that the waste discharge requirements were improperly issued on various grounds.<sup>4</sup>

## II. CONTENTIONS AND FINDINGS<sup>5</sup>

The petition contends that Caltrans should not have received a permit for storm water discharges from municipal separate storm sewer systems, that the permit ignores the legislative budget process for state agencies, and that the RWQCB

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<sup>2</sup> For a more complete discussion of the storm water provisions in the Clean Water Act, and the development of the regulation of storm water discharges, see SWRCB Order No. WQ 91-03.

<sup>3</sup> Clean Water Act Section 402(p)(2).

<sup>4</sup> Caltrans also requested the SWRCB hold a hearing on the matter, pursuant to Title 23, California Code of Regulations (CCR) Section 2052. In support of its request, Caltrans asserts that it was precluded from presenting evidence regarding the financial implications of compliance by the RWQCB, and that the RWQCB did not consider Caltrans' statewide role in transportation services. The record of the RWQCB indicates the Board did allow Caltrans to discuss finances, and in fact most of the testimony on that issue was elicited by questions of Board members rather than by Caltrans. There is nothing in the record to support the allegation that Caltrans was prevented from discussing its statewide role. Therefore, we conclude that a hearing is not appropriate before the SWRCB. We also note that Caltrans requested a stay of the effect of the waste discharge requirements. The stay request was dismissed on November 10, 1994.

<sup>5</sup> All other contentions raised in the petition which are not discussed in this order are dismissed. 23 CCR Section 2052; *People v. Barry* (1987) 194 Cal.App.3d 158.

was required to obtain data on the significance of highway runoff to water quality prior to issuing the permit. Caltrans also objects to a number of specific provisions in the waste discharge requirements. Finally, in a supplemental memorandum of points and authorities, Caltrans raises other issues, including alleged inconsistency between this permit and its obligations to comply with federal highway laws.

Contention: Caltrans should not have received a permit for discharges of storm water to a municipal separate storm sewer system.

Findings: Caltrans advances various arguments in support of its contention that the waste discharge requirements improperly refer to it as a discharger to a municipal separate storm sewer system. In its petition, Caltrans claims that it is not a "municipality". In its supplemental points and authorities, Caltrans admits that the regulations adopted by the federal Environmental Protection Agency (EPA) to implement the Clean Water Act storm water provisions require the issuance of municipal separate storm sewer permits to state agencies, but Caltrans claims that those regulations are inconsistent with the Clean Water Act.

The thrust of Caltrans' argument is that the Clean Water Act defines "municipality" as "a city, town, borough, county, parish, district, association",<sup>6</sup> and provides a separate definition for "State".<sup>7</sup> In the EPA regulations adopted to

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<sup>6</sup> Clean Water Act Section 502(4).

<sup>7</sup> Clean Water Act Section 502(3).

implement Clean Water Act Section 402(p), "municipal separate storm sewer" is defined to include storm sewer systems, including roads with drainage systems, owned or operated by a state.

40 CFR §122.26(b)(8).<sup>8</sup> Caltrans contends that the inclusion of state-owned facilities in Section 122.26(b)(8) is in direct conflict with the Clean Water Act definitions, which separate "state" and "municipality", and that the SWRCB should ignore EPA's regulation.

Administrative agencies are generally accorded a high degree of deference in the areas of law which they regulate. See, e.g., *Chevron U.S.A. v. Natural Res. Def. Council* (1984) 467 U.S. 837. In interpreting EPA's regulations, it is proper to accord significant deference to EPA. Moreover, in issuing NPDES permits, the RWQCB is required to comply with EPA regulations, 40 CFR Section 123.25, including the regulations

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<sup>8</sup> Section 122.26(b)(8) states:

"Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2."

concerning storm water. 40 CFR Section 123.25(a)(9). A challenge to the EPA regulations would be appropriately addressed to the EPA or the federal courts, and not to the SWRCB. In fact, as noted by Caltrans, the Ninth Circuit Court of Appeals has already reviewed and approved EPA's definition of municipal separate storm sewer. *National Res. Def. Council v. United States Environmental Protection Agency* (9th Cir. 1992) 966 F2d 1292.

In any event, we see no conflict between distinguishing between a "municipality" and a "state" in the definitions section of the Clean Water Act, while determining that a state agency may own or operate a "municipal separate storm sewer system." In the preamble to its regulation, EPA discussed in some detail the need to include state highways in its storm water regulations, and the analysis there is persuasive. Volume 55, Federal Register, 47990, 48036-48039, November 16, 1990.

While Caltrans is correct in contending that it does not have some of the powers and authorities reserved to cities and counties, EPA clearly chose to include other agencies responsible for storm sewer systems in municipal storm water permits, including not only state highway agencies but also special districts. EPA expressed the hope that the various municipal storm sewer entities would work together, either as co-permittees or at least on a cooperative basis, in order to exercise their various powers and authorities to regulate storm water discharges effectively. See, Vol. 55, Fed. Reg., at page 48041.

Contention: Caltrans argues that the waste discharge requirements ignore the legislative budget process and certain federal mandates.

Finding: Caltrans contends that, as a state agency, it is under peculiar restraints in complying with the waste discharge requirements. While it is true that Caltrans may have less direct control over decisions regarding its budget than do local agencies, some of those agencies are no doubt under budgetary restraints at least as severe as those facing Caltrans. Moreover, while financial ability is a concern to be addressed in adopting waste discharge requirements, it cannot be a basis for not adopting a permit at all. In reviewing the waste discharge requirements at issue, the RWQCB did consider financial restraints and adopted provisions which are quite flexible and allow Caltrans a great deal of discretion regarding program development.

Caltrans complains specifically of the cost of the reports it is required to submit, and the time schedule for submissions. Most of these reports should already have been submitted as part of Caltrans' application for the permit. See, 40 CFR Section 122.26(d)(2). The application was required to be completed by May 17, 1993. We cannot find that it was inappropriate for the RWQCB to require completion of the reports by mid-1995.

We also note that the Federal Highway Administration (FHWA) guidelines require construction and operation to standards which "minimize erosion and sediment damage ... and abate

pollution of surface and ground water resources". 23 CFR Sections 650.203, 650.211. We are not aware of any conflict between the EPA's requirements and those of the FHWA.

Contention: The RWQCB was required to obtain information on the impacts of highway runoff to water quality prior to issuing a permit.

Findings: Caltrans owns or operates a municipal separate storm sewer system pursuant to EPA regulations implementing Clean Water Act Section 402(p). Section 402(p) requires permits for a large and medium municipal separate storm sewers. The definitions of large and medium municipal separate storm sewers are based on population, and generally apply to urban areas with a population exceeding 100,000. 40 CFR Section 122.26(b)(4) and (7). A permit is required where the population figures are met or exceeded; issuance is not conditioned on proving actual impacts to water quality.<sup>9</sup>

Contention: The permit improperly requires Caltrans to show legal authority which it does not possess.

Findings: The permit requires Caltrans to submit a storm water management plan which demonstrates adequate legal authority to control storm water and nonstorm water discharges to its system. This requirement is specifically required by the EPA regulations. 40 CFR Section 122.26(d)((2)(i). Acknowledging that Caltrans does not have the traditional police powers associated with municipal government, the permit states that the

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<sup>9</sup> The regulations were based upon extensive studies which documented impacts on water quality from large and medium urban areas.

legal authority requirement may be met by "the establishment, or ability to establish, interagency agreements, contractor compliance requirements, and appropriate inspection and enforcement authority". Provision D.2.b. This requirement is written so that Caltrans can show adequate legal authority simply by working with other municipal permittees or with state law enforcement agencies such as the California Highway Patrol. We also note that the Storm Water Management Program which Caltrans submitted does cite legal authority as required by the EPA regulation. See, Caltrans Storm Water Management Plan, at page 1-3, July 1993. Caltrans also submitted a full discussion of its legal authority in the Part 2 Application for the storm water permit issued by the Central Valley Regional Water Quality Control Board, and which is hereby made a part of this record. Caltrans Part 2 Permit Application, for Caltrans Districts 3, 4, 6, and 10, pages 2-4.

Contention: The SWRCB should rescind the permit and instead develop an alternative arrangement to accomplish the same water quality objectives in a consistent, statewide approach.

Findings: The Clean Water Act requires that an NPDES permit be issued for discharges from municipal separate storm sewers, including state-owned highways. The SWRCB does not have the option to use an "alternative method" to achieve the same results. The RWQCB in fact used the maximum flexibility allowed to it in developing an NPDES permit reflective of Caltrans' primary role of constructing and maintaining highways. Should Caltrans wish to obtain a single statewide permit, it may submit

an application, and the SWRCB would consider the propriety of such a permit.

III. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioner, and for the reasons discussed above, we conclude that the Regional Water Quality Control Board, San Francisco Bay Region, acted appropriately and properly in adopting the NPDES permit for storm water discharges from construction, maintenance and operation of highways, expressways, freeways and maintenance facilities owned by the State of California, Department of Transportation, Districts 4 and 10.

IV. ORDER

IT IS ORDERED that the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 17, 1995.

AYE: John Caffrey  
Mary Jane Forster  
James M. Stubchaer  
John W. Brown

NO: None

ABSENT: Marc Del Piero

ABSTAIN: None

  
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Maureen Marché  
Administrative Assistant to the Board

